APPENDIX

Appendix A — Sixth Circuit Order (Jan. 5, 2026)

Appendix B — District Court Order Denying § 2255 (to be attached)

No. 25-5816

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: KENNETH RICHARD DEVORE,

Movant.

ORDER

Before: SUTTON, Chief Judge; CLAY and McKEAGUE, Circuit Judges.

Kenneth Richard DeVore, proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2255 motion.

A jury found DeVore guilty of six counts of wire fraud, theft of public money, mail fraud, having a financial conflict of interest as an executive branch employee, and three counts of making a false statement in a governmental matter. The charges were related to his collection of total disability benefits from the Department of Veterans Affairs ("VA"), his scheme to defraud a mentally incompetent disabled veteran by making himself the sole beneficiary of the man's will, and his false statements when seeking employment with the Office of Personnel Management. The district court sentenced DeVore to 96 months in prison. We affirmed the district court's judgment. DeVore unsuccessfully sought § 2255 relief.

DeVore now moves for authorization to file a second or successive § 2255 motion that raises various grounds for relief. We may authorize the filing of a second or successive § 2255 motion where the movant makes a prima facie showing that the motion contains

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h); *see also* 28 U.S.C. § 2244(b)(3).

DeVore has not made the necessary showing. First, he has not identified a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that is relevant to his proposed claims. In addition, he does not identify any new evidence supporting several of his proposed claims, and the remaining claims are not supported by newly discovered evidence that is sufficient to clearly and convincingly establish that no reasonable factfinder would have found him guilty.

DeVore bases some of his proposed claims on the fact that the prosecution did not retain the envelope that was used to prove his use of the mail for purposes of his mail fraud conviction. He contends that the envelope's postmark or forensic testing on the envelope could have refuted the government's theory of guilt. This evidence is not newly discovered, as DeVore knew before trial that the envelope had been discarded, and his speculation about what the envelope could prove does not clearly and convincingly establish that no reasonable factfinder would have found him guilty of mail fraud.

DeVore bases other proposed claims on records showing that the man whose will he manipulated had a mental disability. He contends that the evidence would have negated his own fraudulent intent because state law requires an individual to be of sound mind to make a will. This evidence is insufficient to make the showing required by § 2255(h)(1) because it does not negate DeVore's fraudulent intent or otherwise establish that no reasonable factfinder would have found him guilty.

DeVore bases other proposed claims on an email allegedly showing that his counsel did not convey to him a plea offer made by the prosecutor. The email is not a basis for authorizing a second or successive § 2255 motion because it does not show that the prosecutor conveyed a plea offer, and it does not clearly and convincingly establish that no reasonable factfinder would have found DeVore guilty.

DeVore bases other proposed claims on official employment records showing that he was on approved leave without pay under the Family and Medical Leave Act. He contends that the evidence shows that he did not make a false statement to the VA examiner by claiming that he was

not working. This argument is not based on newly discovered evidence because DeVore would have known at trial that he was on approved leave during the relevant period.

Accordingly, we **DENY** DeVore's motion for authorization to file a second or successive § 2255 motion.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

KENNETH RICHARD DEVORE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	2:21-CV-00071-DCLC-CRW

MEMORANDUM OPINION AND ORDER

Before the Court is the Report and Recommendation ("R&R") of the United States Magistrate Judge [Doc. 32] recommending that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 [Doc. 1] be denied. Following an evidentiary hearing before the magistrate judge on January 31, 2023, [*see* Doc. 29], the magistrate judge issued the R&R, and Petitioner filed timely objections [Doc. 43]. The United States (the "Government") responded to those objections [Doc. 46]. This matter is now ripe. For the reasons stated below, the Court **ADOPTS** the R&R [Doc. 32] and **DENIES** Petitioner's § 2255 motion [Doc. 1]. The motion is **DISMISSED**.

I. BACKGROUND

As further detailed by the magistrate judge in the R&R, Petitioner alleges his court-appointed counsel, former Federal Defender Tim Moore, provided ineffective assistance of counsel by revealing privileged information that resulted in additional criminal charges being brought against him [Doc. 32, pg. 3].[1] Specifically, Petitioner claims that Moore disclosed

[1] Petitioner alleged four additional claims of ineffective assistance of counsel, which the Court previously denied and dismissed [*See* Doc. 16].

psychological assessments that Petitioner provided to the Department of Veteran's Affairs ("the VA") when he applied for disability benefits along with the VA letter identifying his disability rating, which resulted in the return of a Second Superseding Indictment charging Petitioner with six counts of Mail Fraud in violation of 18 U.S.C. § 1343; one count of Theft of Public Money in violation of 18 U.S.C. § 64; one count of Mail Fraud in violation of 18 U.S.C. § 1341; one count of Financial Conflict of Interest in violation of 18 U.S.C. § 208; and three counts of Giving False Statements in violation of 18 U.S.C. § 1001 [Doc. 32, pgs. 1–2, 4–5]. A jury convicted Petitioner on all counts, and on November 5, 2018, the Court sentenced him to 96 months' imprisonment to be followed by a three-year term of supervised release [Case No. 2:17-CR-13 ("Criminal Case"), Doc. 122; Criminal Case, Doc. 157; Criminal Case, Doc. 158, pgs. 3–4]. Following an unsuccessful appeals process, [*see* Criminal Case, Doc. 171], Petitioner initiated the instant action.

The Court referred Petitioner's claim of ineffective assistance of counsel to the magistrate judge [Doc. 16, pg. 13], who conducted an evidentiary hearing [Doc. 29] and determined that the information allegedly disclosed was not protected by the attorney-client privilege and, even if protected, Petitioner failed to establish he was prejudiced at trial or sentencing by any disclosure [Doc. 32, pgs. 13–16]. In particular, the magistrate judge found that the information was not confidential as it related to the United States because the United States had various avenues for obtaining it: (1) the VA Office of the Inspector General ("OIG") investigation, (2) the United States Probation Office, and (3) Petitioner's presentence report [Doc. 32, pgs. 13–14].

The magistrate judge further found that even if the information was protected from disclosure to the United States, Petitioner failed to establish that he was prejudiced by the disclosure because (1) his sentencing guideline range would have been the same without the additional charges; (2) his pattern of dishonesty was clear from the record, and that information

was available at sentencing; and (3) any potential prejudice to Petitioner due to the number of charges at trial could be cured with limiting instructions to the jury [Doc. 32, pgs. 14–15]. Petitioner filed timely objections to the R&R, arguing that the testimony at the evidentiary hearing shows that Moore provided ineffective assistance of counsel by revealing privileged information that resulted in many additional charges being added by way of the Second Superseding Indictment [Doc. 43, pg. 10]. The United States responded in opposition, arguing that the Court should overrule Petitioner's objections [Doc. 46].

II. LEGAL STANDARD

Under 28 U.S.C. § 636, a district court may "designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of ... applications for posttrial relief made by individuals convicted of criminal offenses...." 28 U.S.C. § 636(b)(1)(B). Parties may file written objections to the R&R within fourteen days after service. 28 U.S.C. § 636(b). This Court must conduct a *de novo* review of those portions of the Report and Recommendation to which objection is made and may accept, reject, or modify, in whole or in part, the Magistrate Judge's findings or recommendations. 28 U.S.C. § 636(b)(1); *Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). "However, the district court need not provide *de novo* review where the objections are '[f]rivolous, conclusive or general.'" *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (citation omitted).

III. ANALYSIS

Petitioner does not object to the magistrate judge's recitation of the legal standards applicable to § 2255 motions [Doc. 43, pg. 10]. Rather, Petitioner raises the following objections to the magistrate judge's findings: (1) that Moore's purported disclosure of documents pertaining

to his VA disability status violated the attorney-client privilege, [Doc. 43, pgs. 12–13], and (2) that Petitioner suffered prejudice [Doc. 43, pg. 14]. The Court will address these arguments in turn. Petitioner also objects to the magistrate judge's finding that the Government would have inevitably discovered information regarding Petitioner's disability status [Doc. 43, pgs. 13–14]. The Court addresses this argument as it relates to the prejudice prong.

First, Petitioner contends information and documents concerning his disability status were protected by the attorney-client privilege [Doc. 43, pgs. 12–13]. "The elements of the attorney-client privilege are as follows: (1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived." *Reed v. Baxter*, 134 F.3d 351, 355–56 (6th Cir. 1998) (citing *Fausek v. White*, 965 F.2d 126, 129 (6th Cir.1992)). "The purpose of the attorney-client privilege is to encourage clients to communicate freely with their attorneys." *In re Grand Jury Proceedings Oct. 12, 1995*, 78 F.3d 251, 254 (6th Cir. 1996) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). "But because the privilege operates to reduce the amount of information discoverable during the course of a lawsuit, it is narrowly construed." *Id.* (citing *In re Grand Jury Investigation No. 83–2–35*, 723 F.2d 447, 451 (6th Cir.1983)). The party asserting the privilege bears the burden of showing it applies. *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999) (citing *In re Grand Jury Investigation*, 723 F.2d at 450).

Here, Petitioner argues the privilege applies to the psychological assessments and VA rating because although the VA possessed the documents, the United States Attorney's Office did not [Doc. 43, pgs. 12–13]. But what matters is not whether the United States Attorney's Office already possessed the documents. What matters is whether the psychological assessments and VA

rating were confidential communications for the purpose of obtaining legal advice, and whether Petitioner waived the privilege. *See Reed*, 134 F.3d at 355–56. In finding the privilege did not apply, the magistrate judge noted the information concerning Petitioner's disability status was not confidential because he had provided it to the VA in applying for disability benefits and to the United States Probation Office when completing his financial affidavit [Doc. 32, pg. 13]. Petitioner fails to explain how the magistrate judge's decision was incorrect [*See* Doc. 43, pgs. 12–13]. Ultimately, Petitioner has the burden of showing the privilege applies. *See Dakota*, 197 F.3d at 825. Petitioner fails to carry that burden.

In any event, Petitioner fails to show any disclosure by Moore prejudiced him. Petitioner concedes the VA disability fraud charges did not impact his sentence [Doc. 43, pg. 14]. He nonetheless argues prejudice arose from being "forced into a trial on a twelve-count Second Superseding Indictment alleging different, unrelated fraudulent acts" [Doc. 43, pg. 14]. But contrary to Petitioner's argument, these acts were related. While a VA employee, Petitioner drafted a fraudulent will for a VA program beneficiary [Criminal Case, Doc. 67, ¶¶ 30, 40–42; Criminal Case, Doc. 131, ¶¶ 30, 40]. That employment occurred during a time the VA classified petitioner as totally disabled because he claimed he was unable to work [Criminal Case Doc. 67, ¶¶ 12, 23–24; Criminal Case, Doc. 131, ¶¶ 13–14]. When Petitioner applied to work for the OPM, he misrepresented his reasons for leaving the VA, failing to acknowledge he left by agreement due to misconduct [Criminal Case Doc. 67, ¶¶ 54, 56, 58; Criminal Case, Doc. 131, ¶ 51]. As the Court noted in denying Petitioner's Motion to Sever the counts of the Second Superseding Indictment relating to each of these acts, [*see* Criminal Case Doc. 88, pg. 3], any prejudice resulting from trying these charges together would be curable with a proper limiting instruction, and "juries are presumed to follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

Nonetheless, Petitioner asserts he would not have faced the additional charges but for the purported disclosure of the VA disability records [Doc. 43, pg. 14]. The magistrate judge, however, noted the documents were already in the Government's possession and concluded the prosecution's discovery of that information was inevitable [Doc. 32, pg. 13]. Petitioner argues the discovery was not inevitable and emphasizes that AUSA Gunn commented in a November 2, 2017 hearing that "just a few weeks ago the United States learned that the Defendant ... has a 100 percent total permanent disability rating," suggesting the Government was unaware of petitioner's disability status previously [Criminal Case, Doc. 193, pg. 2; *see* Doc. 43, pg. 14].

However, as the magistrate judge noted in the R&R, there were multiple avenues through which the Government likely would have independently learned of the disability fraud [*See* Doc. 32, pgs. 13–14]. According to Special Agent Pack, the VA OIG routinely checked the records of employees under investigation [Doc. 35, pg. 48]. And, according to Pack, Petitioner's VA disability records were readily available to the Government [Doc. 35, pg. 50]. Petitioner argues Agent Pack's testimony was not believable because he had no explanation for AUSA Harker and AUSA Gunn's need to contact him about the VA disability issue when Pack had purportedly spoken with them about it previously [Doc. 43, pg. 13]. Petitioner further contends the AUSA's comments in the November 2, 2017 hearing that the Government learned of Petitioner's disability status "a few weeks ago" undermined Pack's testimony he had informed them earlier [Criminal Case, Doc. 193, pg. 2; Doc. 43, pg. 14]. But these timing issues do not undermine the conclusion that the United States Attorney's Office was likely to obtain the documents regardless of any disclosure by Moore because they were already in the Government's possession and the Government was investigating Petitioner.

Moreover, after the September 22, 2017 *ex parte* hearing on Petitioner's finances, the Court

notified the United States Attorney's Office the Court was considering disclosing Petitioner's financial affidavit but would not do so until the appropriate time [*See* Criminal Case, Doc. 193, pg. 5]. Thus, the United States Attorney's Office was aware of an issue with Petitioner's financial affidavit even if it lacked the details. Then there was the Court's November 8, 2017 order where the Court reexamined Petitioner's eligibility for court-appointed counsel [Criminal Case, Doc. 65]. Despite initially appointing the Federal Defender to represent Defendant, the Court noted that following an *ex parte* hearing on Petitioner's finances, "[i]t now appears to the Court that the information on which it based its decision was inaccurate" [Criminal Case, Doc. 65, pg. 1]. Even without Moore's purported disclosure of VA disability documents, it would have been a dereliction for the Government to fail to investigate further.

Further, as noted in the March 29, 2018 email exchange between Moore and Gunn, the Probation Office discovered during the course of the criminal proceedings that Petitioner had been working for OPM, and both parties at some point became aware of that [*See* Doc. 35, pgs. 67–68]. Then, Petitioner lied to the probation officer regarding his employment with USPS, which was a factor contributing to the revocation of his pretrial release [Criminal Case, Doc. 107, pg. 2]. The Probation Office is required to notify the Court and the United States Attorney when a defendant violates release conditions. 18 U.S.C. § 3154(5). Thus, regardless of any disclosure by Moore, Petitioner's employment with USPS would have come to light through the petition for revocation of pretrial release. Because it appeared by that point that Petitioner had been working on and off since at least January 2013, [*see* Criminal Case, Doc. 67, ¶ 30], any information the Government had regarding Petitioner's entitlement to permanent and total disability benefits would have been in serious doubt. Further, the preparation of Petitioner's presentence investigation report would likely have revealed both his work-related and disability income, thus providing another route for

the disability fraud to come to light [*See* Criminal Case, Doc. 131, ¶¶ 99–101].

In sum, even without Moore's purported disclosure of VA disability documents to the Government, the facts of Petitioner's employment and receipt of disability benefits from the VA would likely have come out during Petitioner's criminal case anyway. As explained, Petitioner suffered no prejudice at trial. He concedes the disability fraud charges did not impact his sentence [Doc. 43, pg. 14]. Thus, there is no "reasonable probability" the result would have been different. *Griffin*, 330 F.3d at 736 (quoting *Strickland*, 466 U.S. at 694). Because Petitioner suffered no prejudice from any purportedly deficient performance by his attorney, his remaining § 2255 claim fails.

IV. CONCLUSION

For these reasons, the R&R [Doc. 32] is **ADOPTED** and Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 [Doc. 1] is **DENIED**. The motion is **DISMISSED**.

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit disapproves of the issuance of blanket denials of certificates of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). The district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* at 467. Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Id.*

Under *Slack*, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable

or wrong." *Slack*, 529 U.S. at 484. Having examined each of the petitioner's claims under the *Slack* standard, the Court finds that reasonable jurists could not conclude that this Court's dismissal of petitioner's claims was debatable or wrong. Therefore, the Court will deny petitioner a certificate of appealability as to each claim raised.

SO ORDERED:

s/ Clifton L. Corker
United States District Court